considered as mortgagee of the property and obtained an order for sale and leave to bid at the auction. At the auction he bought the property and in May 1931 negotiations began between the plaintiff and the defendant. The result of these negotiations was that the defendant was allowed to occupy the premises pending an agreement as to the amount of rent which has to be paid.

The claim in this action was for:—

(1) Recovery of possession of the property in question,
(2) Recovery of $100 arrears of rent, and
(3) Mesne profits from date of determination of tenancy until date of delivery of possession.

The defendant resisted the claim on the ground that the District Court had no jurisdiction to try the action which was for the recovery of immoveable property.

*Price*, for the Plaintiff.

*Tan Cheng Hock*, for the defendant.

The District Judge Mr. Bassett delivered the following grounds of judgment:—

"In this suit the defendant raised the preliminary point that there was no jurisdiction in the District Court to decide the suit. This proposition was based on two grounds.

(1) That there was no relationship of landlord and tenant within the meaning of section 43 (1) Courts Ordinance.
(2) That there was a *bona fide* question of title involved.

"The case of *Koffman* v. *Sunshine and another* W.N. December 5th, 1931 at page 265 was quoted by the Plaintiff. I did not think that that was an analogous case but ruled that before I could decide the question of jurisdiction I must hear the evidence. Having heard the evidence I decided that there was the necessary relationship of landlord and tenant under Section 43 (1) Courts Ordinance and that there was no *bona fide* question of title involved. After hearing the evidence I came to the conclusion that the Defendant's claim to the house was a sham, without merits at all and could not be considered a *bona fide* claim. I ruled therefore that the Court had jurisdiction and gave judgment for the Plaintiff.

"It was extremely difficult to understand clearly what the Defendant's claim was.

"At one time he argued that the house was immoveable property and that the Court had no jurisdiction and alternatively he argued that the house was moveable property.

"After hearing the evidence of Mr. Thorpe and examining the plan it seemed to me indisputable that the house was immoveable property. The house was built with a kitchen which had a concrete floor and undoubtedly to remove it would have meant either partitioning the house or digging up this cement floor. Again turning to the agreement with the chetty upon which the Defendant based his claim it seemed that even then the so give the Defendant a good title to the house) or if unable to transfer the land would give him a sum of money plus compensation for building the house. I found that the Defendant therefore was a tenant at will of the Chetty. When the Chetty conveyed the house and land to the Plaintiff he became a tenant at sufferance of the Plaintiff.

"I held that this would have been sufficient relationship to satisfy the requirements of Section 43 (1) Courts Ordinance but in fact I found that the Plaintiff had allowed Defendant to occupy the house and land pending an agreement as to the amount of rent and that Defendant had thus become a tenant at will. On these grounds I decided that the Court had jurisdiction and gave judgment for the Plaintiff in terms of paragraph 1 of claim and sum of $40 under paragraph 3 of claim."

Solicitors for the Plaintiff—
*Presgrave and Matthews.*
Solicitor for the Defendant—
*Ong Huck Lim.*

From the above Judgment the defendant appealed to the Court of Appeal, consisting of Murison C. J., Prichard and Terrell, JJ. who unanimously dismissed the appeal.

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[CRIMINAL APPELLATE JURISDICTION]

**HO CHICK KWAN (Appellant)**

vs.

**1. THE HON'BLE, THE BRITISH RESIDENT, SELANGOR**

**2. THE GAOLER, PUDU GAOL, KUALA LUMPUR (Respondents).**

[SELANGOR CRIMINAL APPEAL No. 43 OF 1931]
[K. L. MISCELLANEOUS CRIMINAL APPLICATION No. 11 of 1931]

*Banishment—arrest and detention—legality of Order of the Resident—competency of the Court to investigate—conflict of laws—nationality—subject of Ruler of Negri Sembilan domiciled in Selangor—whether a subject of the Federated Malay States—Banishment Enactment, 1910, S. 3; Criminal Procedure Code, Ss. 363 & 373; Treaty of Federation, 1895; Naturalisation Enactment, 1904.*

The Resident of a Federated Malay State is vested with powers of arrest and detention under the Banishment Enactment. Before these powers could be exercised he is bound to take the required preliminary steps necessary for the creation of those powers. Once it is satisfied that those steps have been lawfully taken, the Court is *functus officio.*

A natural-born subject of the Ruler of State of Negri Sembilan cannot be regarded as a natural-born subject of the ruler of any other state in the Federation.

The appellant, who was detained in the Pudu goal, Kuala Lumpur undor the Banishment Enactment applied to be set at liberty. The application made by way of motion was for an order in the nature of a *Habeas Corpus.*

The facts and arguments sufficiently appear from the Judgments both of Elphinstone, C.J. and of the Court of Appeal.

*Veerasamy*, for the Applicant.

*Gibson*, Legal Advisor for the Respondents.

*Cur. Ad. Vult.*

**ELPHINSTONE, C. J.**—This is an application by Ho Chick Kwan for an order in the nature of habeas corpus under section 363 of the Criminal Procedure Code, 1926. The questions raised are—

(1) whether the validity of an order made by the Resident of Selangor under section 3 of the Banishment Enactment, 1910, for the arrest and detention of the applicant with a view to his banishment by the Ruler can be investigated on an application for an order in the nature of habeas corpus under section 363 of the Criminal Procedure Code, 1926 and

(2) whether the applicant, being a natural born subject of the Ruler of the State of Negri Sembilan but resident in the State of Selangor, can lawfully be banished by the Ruler of the State of Selangor.

The facts are as follows. The applicant Ho Chick Kwan was born on the 19th July 1906 in the State of Negri Sembilan. It was stated, but not proved, that his father was a Chinese subject. By the Chinese Law dated the 7th February 1929 the son of a Chinese subject is also a Chinese subject. Hence the applicant may have dual nationality. Two months after his birth the applicant was adopted by Lui Ho and her late husband, and since then has lived in Kuala Lumpur in the State of Selangor. Lui Ho said in her affidavit:—

> "The domicile of my late husband at the time of and before his death was in the State of Selangor and neither I nor my son, the said Ho Chiak Kwan (the applicant) have changed nor intended to change our domicile. We owe true allegiance to His Highness the Sultan of Selangor."

The applicant was recently arrested and is now detained in Pudu Gaol by the authority of an order made by the British Resident of Selangor under section 3 of the Banishment Enactment, 1910, as amended by Enactments No. 24 of 1923 and No. 11 of 1928. An order may be made under section 3 for the arrest and detention of a person for one of two purposes, viz. (1) that he be banished, or (2) that he be required to execute a bond for his good behaviour. No evidence was given to show for which of these two purposes the applicant was arrested, but it was assumed throughout the argument that he was arrested with a view to his banishment. The order was not produced, but no suggestion was made that the order was not in proper form or that the Resident had failed to make proper enquiry before making the order. The only ground on which it is suggested that the arrest and the detention of the applicant is illegal is that he was born in the State of Negri Sembilan, and resides in the State of Selangor.

On the 11th December, 1931, I made an order *ex parte* under section 363 of the Criminal Procedure Code for the British Resident of Selangor and the gaoler having the custody of the applicant to show cause why the applicant should not be set at liberty. On the 21st December, the respondents showed cause appearing by Mr. Gibson, the Legal Adviser of the Federated Malay States.

The first question to be decided is whether it is competent for this Court to investigate the validity of the order for arrest and detention. Section 363 of the Criminal Procedure Code so far as relevant, reads as follows:—

> "363. The court of a Judge may whenever it thinks fit direct
>
> (1) that any person who.....
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federated Malay States, be set at liberty."

Section 373 reads:—

> "Nothing in this chapter contained shall apply to any person detained in public custody under the provisions of any law in force for the time being relating to banishment."

There is no doubt that, but for section 373, it would be the duty of the Court to enquire whether the order of arrest and detention was lawfully made. That follows from the decision of the Privy Council on appeal from the Supreme Court of Nigeria in the case of *Eshugbayi Eleko* v. *The Government of Nigeria*, 1931 A.C. 662. In that case the Governor of Nigeria, purporting to act under the Deposed Chiefs Removal Ordinance, ordered the appellant to leave a specified area, and upon his failing to comply ordered his deportation to another place in the Colony. The appellant applied to the Supreme Court of Nigeria for a writ of *habeas corpus* contending *(inter alia)* that he was not a native chief and that the conditions did not exist entitling the Governor to make the orders. The full Court of the Supreme Court refused to issue a writ of *habeas corpus*, holding that it was incompetent for the Supreme Court to investigate the legality of the orders. The Privy Council reversed this decision. Lord

Atkin in delivering the judgment of the Board said (at page 670):—

> "Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that judges should not shrink from deciding such issue in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was an alien, the subject would have the right to question the validity of any detention under such order by proceedings in *habeas corpus*, and that it would be the duty of the Courts to investigate the issue of alien or not. The case of *Rex* v. *Governor of Brixton Prison* (1916, 2 K.B. 742), turned first on the question whether the regulation under which the order was made was *ultra vires*, which was a question of law. It further turned on the question whether the Secretary of State was abusing the powers given to him under the order by using them to deport a mere criminal, who, it was suggested, was no danger to the State. The Court expressly held they had power to consider this question and resolved it against the applicant. The question whether the applicant was an alien or not did not arise. He admittedly was; but their Lordships agree with the opinion of Low J. that, had the matter been in dispute, the Court would have had to decide it."

The Court, is therefore, bound to investigate the validity of the order for the arrest and detention of the applicant unless it is precluded from so doing by section 373 of the Criminal Procedure Code. That section reads:—

> "Nothing in this Chapter contained shall apply to any person detained in public custody under the provisions of any law in force for the time being relating to banishment."

Apart from authority it would seem that the question whether the applicant is a person detained in public custody under the Banishment Enactment is one of fact, and that section 373 would only become applicable if that question is answered in the affirmative. A somewhat similar point arose in *Minister of Health* v. *The King, Ex parte Yaffe*, 1930, 2 K.B. 98; 1931, A.C. 494. In that case an order had been made by the Minister of Health under the Housing Act, 1925, confirming an improvement scheme with modifications. The Act provides that the "order of the Minister when made shall have effect as if enacted in this Act," and the question arose whether, in view of that provision, it was competent for the Court to investigate the validity of a scheme which had been confirmed by an order of the Minister. In the Divisional Court the majority of the Court held that the order of the Minister cured any defects in the scheme. But Swift J. held that the question whether a confirmatory order had been made was one of fact, and that it was competent for the Court to consider whether the scheme which the Minister had confirmed was in fact a scheme within the meaning of the Act. The Court of Appeal reversed the decision of the Divisional Court, holding that it was competent for the Court to consider whether the conditions precedent to the making of the confirmatory order had been performed, and that if such conditions had not been complied with, the confirmatory order had no statutory effect. The House of Lords by majority reversed the decision of the Court of Appeal on the question of fact, holding that the scheme confirmed by the Minister was a scheme within the meaning of the Act. But their Lordships were unanimous in holding that it was competent for the Court to consider whether the scheme confirmed was a scheme within the meaning of the Act, and also whether the statutory procedure had been complied with so as to entitle the Minister to make the confirmatory order. Lord Thankerton contrasted this question with the case where the delegated power is a discretionary power. He said (at page 533):—

> "Where, however, the power delegated to the Minister is a discretionary power, the exercise of that power within the limits of the discretion will not be open to challenge in a Court of law. The power of modification conferred in the Minister in the present case is an example of such a discretionary power."

It seems to me that the principles laid down in *Ex parte Yaffe* apply to the present case, and that the question whether the applicant is a person detained in public custody under the Banishment Enactment is one of fact, and that it is only when the fact is proved in the affirmative

is, therefore, bound to consider whether the conditions precedent to making the order for the arrest and detention of the applicant were fulfilled. Section 3(i) of the Banishment Enactment, 1910, as amended by Enactments Nos. 24 of 1923 and 11 of 1928 reads as follows:—

> "3. (i). Whenever it shall appear to the Resident of any of the Federated Malay States after such enquiry or on such written information as he may deem necessary that there are reasonable grounds for believing that the banishment from the State of any person in the State is conducive to the good of the State or of any other Malay State or that it is expedient that such person be required to execute a bond for his good behaviour the Resident shall issue an order for the arrest and detention or if he is already in prison for the detention, of such person and shall lay before the Ruler of the State a written statement of the grounds upon which it so appears to him, and the Ruler of the State may thereupon, with the advice and consent of the Resident order that such person be banished from the State, or may with the like advice and consent order that such person do before a day to be named in the order execute a bond with sureties for his good behaviour in such amount and for such period as may be fixed by such order."

The conditions precedent to the making of an order for the arrest and detention of a person appear to be

(1) that the person is a "person in the State" within the meaning of the Enactment, and

(2) that it appeared to the Resident after inquiry or on written information that there were reasonable grounds for believing that the banishment of the person was conducive to the good of the State or of any other Malay State. No suggestion was made that condition (2) has not been fulfilled. The only question is whether the applicant, in view of his birth in Negri Sembilan and his residence in Selangor, is "person in the State" within the meaning of section 3. If it is established that the appellant is "person in the State" then, as no question arises as to condition (2), section 373 will become applicable and the Court will be *functus officio*, and it would not be competent for the Court to challenge the right of the Ruler to order that the applicant be banished, or the propriety of anything done under the Banishment Enactment so long as the applicant is detained in public custody under the Enactment. As regards condition (2), if it were to be shown that the Resident acting in good faith and after such enquiry or on written information as he deemed necessary had formed the opinion that there were reasonable grounds for believing that the banishment of the applicant would be conducive to the good of the State or of any other Malay State, then, as at present advised, I am of opinion that it would not be competent for the Court to challenge the sufficiency of the grounds on which the Resident formed his opinion. The condition precedent is, not that there are reasonable grounds for the Resident's belief, but that it shall appear to the Resident that there are such reasonable grounds. However, it is unnecessary for me to decide or express a final opinion on the point.

I will now consider whether the applicant is a "person in the State" within the meaning of the Banishment Enactment. The applicant was born in the State of Negri Sembilan and according to the general principle of international law became a natural born subject of the Ruler of that State. It was, however, contended that the applicant by reason of his birth in the State of Negri Sembilan acquired what was called "Federated Malay States nationality," and so became a subject of each of the States in the Federated Malay States. In my opinion this contention is based on a misconception of the nature of the Federation existing between the several States. The Federation was created by the Treaty of Federation, 1895, which is to be found in volume 1 of "Treaties and engagements affecting the Malay States and Borneo" by Maxwell and Gibson, at page 70. Previous to that treaty each of the States had by separate agreements agreed to place themselves under the protection of the British Government. The treaty reads as follows:—

> "Treaty of Federation, 1895.
>
> Agreement between the Governor of the Straits Settlements, acting on behalf of the Government of Her Majesty the Queen, Empress of India, and the Rulers of following Malay States:—That is to say, Perak, Selangor, Pahang and the Negri Sembilan.
>
> "1. In confirmation of various previous agreements, the Sultan of Perak, the Sultan of Selangor, the Sultan of Pahang, and the Chiefs of the States which form the territory known as the Negri Sembilan,

that section 373 becomes applicable. The Court hereby severally place themselves and their States under the protection of the British Government.

2. The above named Rulers and Chiefs of the respective States hereby agree to constitute their countries a Federation, to be known as the Protected Malay States, to be administered under the advice of the British Government.

3. It is to be understood that the arrangement hereby agreed upon does not imply that any one Ruler or Chief shall exercise any power or authority in respect of any State other than that which he now possesses in the State of which he is the recognised Ruler or Chief.

4. The above named Rulers agree to accept a British Officer, to be styled the Resident General, as the agent and representative of the British Government under the Governor of the Straits Settlements. They undertake to provide him with suitable accommodation, with such salary as is determined by Her Majesty's Government, and to follow his advice in all matters of administration other than those touching the Muhammadan religion The appointment of the Resident Genera will not affect the obligations of the Malay Rulers towards the British Residents now existing or to be hereafter appointed to Offices in the abovementioned protected States.

5. The above named Rulers also agree to give to those States in the Federation which require it such assistance in men, money, or other respects as the British Government, through its duly appointed officers may advise; and they further undertake, should war break out between Her Majesty's Government and that of any other power, to send, on the requisition of the Governor, a body of armed and equipped Indian troops for service in the Straits Settlements.

Nothing in this agreement is intended to curtail any of the powers the authority now held by any of the abovenamed Rulers in their respective States, nor does it alter the relations now existing between any of the States named and the British Empire.

The above Agreement was signed and sealed by the undermentioned Rulers and Chiefs of the various States in July 1895."

It is clear that the treaty of 1895 did not confer on the "Federation" the status of a separate State having an existence independent of the constituent States. The word "Federation" occurs only in clauses 2 and 5. By clause 2 the Rulers and Chiefs agreed "to constitute their countries a Federation, to be known as the Federated Malay States, to be administered under the advice of the British Government." By clause 5 the Rulers agreed to give to those States in the Federation which require it such assistance in men, money, or other respects as the British Government may advise. Construing the treaty as a whole I am of opinion that the four States constituted themselves into a "federation" solely for the purpose of affording each other mutual assistance under clause 5. Clause 5 expressly saves the authority of each Ruler in his own State, which is inconsistent with the idea that the subject of one Ruler thereby becomes the subject of all the Rulers, jointly. It is unnecessary to deal at length with the Agreements of 1909, 1912, 1924, and 1927, constituting the Federal Council. It is sufficient to say that none of these documents supports the idea that the Federation has any separate existence apart from the States. The Agreement of 1909 recites:—

> " .whereas the abovenamed Rulers further desire that means should be provided for the joint arrangement of all matters of common interest to the Federation or affecting more than one State and for the proper enactment of all laws intended to have force throughout the Federation or in more than one State."

Clause 10 of the Agreement of 1927, so far as relevant, reads:—

> "The Council shall pass all laws intended to have force throughout the Federation. Laws passed by the Council shall be enacted in the following words: It is hereby enacted by the Rulers of the Federated Malay States by and with the advice and consent of the Federal Council and shall be signed by each of the Rulers before coming into force."

This is not the form of words which would be adopted if the Federation had a separate existence. It is plain that in this Agreement the word "Federation" is used in a collective sense as a convenient word for denoting the four States.

It was also argued that the Naturalization Enactment 1904, impliedly recognises that a natural born subject of any Ruler is also the subject of each of the other Rulers. This argument was based on the fact that a person who had resided for 5 years within the Federated Malay States is thereby qualified to be naturalized in the State in which he resides at the time when he presents his memorial praying for naturalization, although his qualifying residence may have

been in a different State. It was also said that section 2 confers the privilege of applying for naturalization only on "any person not being a natural born subject of the Ruler of any of the Federated Malay States," and that this showed that a person who is a natural born subject of any of the Rulers could not apply for naturalization, and that the reason for this was that a natural born subject of any of the States was also the subject of each of the other States, so that there was no occasion for him to apply for naturalization. But I think the more probable explanation is that the legislature wished to discourage the acquisition of dual nationality in the Federated Malay States, and has for this reason prevented the subject of one State from being naturalized in another State.

For the above reasons I am of opinion that "Federated Malay States nationality" is not recognised by the law and does not exist, and the applicant is not a subject of the Ruler of Selangor. As however, the point has been fully argued, I propose to consider whether the Banishment Enactment does authorise the banishment of a subject of the Ruler ordering the banishment. The Enactment uses the term 'banish' or 'banishment' throughout. Coke in Coke upon Littleton regards 'exile' and 'banishment' as synonymous. He says (at page 133 a):—

> "for by law no subject can be exiled or banished his country, whereby he shall *perdere patriam* but by authority of Parliament, or in case of adjuration, and that must be open an ordinary proceeding in law."

This passage recognises that 'banishment' is the appropriate word to express the expulsion of the subjects of the expelling State, and that banishment can properly be authorised by the legislature. It is not, therefore, repugnant to general principles that the Enactment should authorise the banishment of the subjects of the banishing State. Such an enactment might give rise to diplomatic difficulties if the Government of the country to whom the banished person is sent should refuse to receive him. But where the person banished has dual nationality, the difficulty could be avoided by sending him to the country of his other nationality. Nor are the Rulers in Federal Council fettered in the exercise of their legislative powers. The only limitations are the reservation by clause 13 of the Agreement of 1927, viz:—

> "...questions connected with the Muhammadan religion, Mosques, Political pensions, Native chiefs, and penghulus and any other questions which in the opinion of the High Commissioner affects the rights and prerogatives of any of the Rulers or which for other reasons he considers should properly dealt with only by the State Councils."

It may also be observed that the word 'banish' is not usually used in Enactments relating to aliens, the word 'deport' being used in such cases. See for instance the British Aliens Restriction Act, 1914, section 1 (c). The only exception of which I am aware is the Straits Settlements Banishment Ordinance No. 153 which is entitled "to consolidate the law relating to the banishment of aliens" and by section 4 authorises the issue of an order 'banishing' any person not being a natural born subject of His Majesty. The very fact that it was considered necessary expressly to limit the operation of the ordinance to persons not being natural born British subjects shows that the word 'banish' is considered to be wide enough to extend to British subjects.

The words "any person in the State" in section 3 of the Banishment Enactment, construed literally, would include all persons whether subjects of the banishing State or not, and this construction is confirmed by the use of the word 'banish.' The only contrary indication arises from section 8 (ii) as it was originally enacted. Section 8 (ii) provided that the banished person should be conveyed in custody "to the country of which he is natural born subject, or elsewhere if so stated in the "warrant." That section seems to have contemplated that the person banished would not be the natural born subject of the banishing State, as such a subject could not be conveyed to the country of which he was a natural born subject. But section 8 (ii) was amended by Enactment No. 12 of 1918 which added at the end of sub-section (ii) the words:—

> "The ship in which the banished person is conveyed in custody under this section shall, unless the banished person is a subject of any of the Rulers of the Federated Malay States, be a ship belonging to the said Rulers or to any of them or to His Britannic Majesty or to any of their respective subjects."

By section 1 (ii) of Enactment No. 12 of 1918 the Enactment is to "be read and construed as one with the Banishment Enactment, 1910." I must, therefore, construe the Banishment Enactment in light of the addition made by Enactment No. 20 of 1928, and the words "unless the banished person is a subject of any of the Rulers of the Federated Malay States" are almost conclusive that the Banishment Enactment does not apply to the subjects of the banishing State. I say 'almost conclusive' because the words might refer to the case where a natural born subject of a State is banished by the Ruler of another State. On the whole, however, I am satisfied that there is nothing in the Enactment which justifies a

departure from the ordinary and literal meaning of the words "banish" and "any person" and that consequently the Ruler of a State has power to order the banishment of his own subjects.

It follows that the order for the arrest and detention of the applicant is valid and that he is a person detained in public custody under the provisions of the Banishment Enactment, and that the Court is precluded by section 373 of the Criminal Procedure Code from ordering that he be set at liberty. I would add that there is no evidence before the Court which would justify the Court in ordering the applicant to be set at liberty even if section 373 did not prohibit such action. For the above reasons I ordered that the order to show cause be discharged, and that the application that Ho Chick Kwan be set at liberty be dismissed. As the Legal Adviser did not press for costs, I made no order as to costs.

The applicant appealed to the Court of Appeal from the above Judgment on the grounds *inter alia* that the learned Chief Justice should have held that the appellant was a subject of the State of Selangor and that the learned Chief Justice was wrong in holding that the Banishment Enactment 1910 applied to a subject of the State of Selangor. The appeal came on for hearing before Thorne, Ag. C. J., Gerahty and Mudie, JJ.

**THORNE, AG. C. J.**—In this matter the appellant moved the Court by a notice of motion of the 10th of December last, alleging that he was then illegally detained in the Pudu gaol for an order that a warrant should issue directing the officer in charge of the gaol to bring him before the Court, and that the Court should consider the matter and order his discharge from custody.

The motion was supported by an affidavit of a woman called Lui Ho, who averred that the appellant was then detained in custody in Pudu gaol by virtue of a warrant purporting to have been issued by the Resident of Selangor, under the provisions of the Banishment Enactment. She said that the appellant was her adopted son, and that his history was that he was born in the mukim of Pajam in the State of Negri Sembilan, on the 19th day of July 1906. He was adopted by the deponent and her husband 2 months after his birth, and since his adoption, had lived with her in Kuala Lumpur. Her Affidavit then proceeds to prove the history of her husband who apparently died in Kuala Lumpur in the year 1921, having lived there for a period of some 35 years. She said that her deceased husband was domiciled by choice in the State of Selangor, and owed allegiance to His Highness the Sultan of Selangor. On that affidavit the learned Chief Justice made an order *nisi*, and called upon all parties concerned to attend the Court to show cause why the appellant should not be set at liberty.

In the opinion of all the members of this Court, whether those proceedings were had under the provisions of the Criminal Procedure Code, or whether they were had under what is called the inherent jurisdiction of the Court, essential facts which should have been proved were not proved by that affidavit. The matter came on, was heard by the learned Chief Justice, and argued in the absence of proof of essential facts.

One other matter I should here mention is that the order made by the learned Chief Justice was an order apparently refusing the order *nisi*—that order does not form part of the record. We would express the hope that in preparing papers care would be taken in future to see that essential matters forming part of the record be put up for the Judges of the Court of Appeal.

With regard to the first matter I have mentioned, we drew the attention of the Legal Adviser to this, and he has been good enough to file two affidavits of the 15th and 16th days of June respectively by the Gaoler of the Pudu gaol, and the Acting Secretary to Resident, Selangor, who supplied the information not previously before the Court. The affidavit of the Gaoler establishes the appellant being received into the Pudu gaol on the 17th of November last with a warrant for his arrest and detention issued by the Resident of Selangor under the Banishment Enactment. He was there detained until February of this year.

The affidavit of the Secretary to the Resident, Selangor, proves that the warrant of arrest and detention was issued against the appellant on the 14th day of November, 1931, under section 3 of the Banishment Enactment, that the warrant was transmitted to the Chief Police Officer on the 14th November, 1931, executed on the 16th day of November, 1931, and a return made by the Chief Police Officer and received by the Secretary to the Resident on the 20th day of November, 1931. That establishes beyond all doubt what was assumed very largely before the learned Chief Justice, namely that the appellant had been arrested, and was detained, under a warrant purporting to issue under the provisions of the Banishment Enactment.

The first question which arises on this appeal is whether under the provisions of section 373 of the Criminal Procedure Code this Court has jurisdiction, or rather the Supreme Court of the Federated Malay States has jurisdiction, to entertain a motion of this kind. The section reads:—

> "Nothing in this Chapter contained shall apply to any person detained in public custody under the provisions of any law in force for the time being relating to banishment."

It is contended that once it is shown that an individual is detained under the provisions of the Banishment Enactment, this Court has no jurisdiction to examine the matter at all. It is to be observed that the section refers to a person being detained in public custody not under the "purported" exercise of the power conferred by the provisions of the Enactment, but " under the provisions of any law in force for the time being relating to banishment."

I am of the opinion that the powers of the Resident under the provisions of the Banishment Enactment are statutory and involve in their exercise direct interference with the liberty of the subject. Unless the steps preliminary to the creation of the statutory power to be exercised by the Resident are strictly complied with, the statutory power does not arise. In my view, upon the true interpretation of section 373 of the Criminal Procedure Code, this Court is cast with the duty of satisfying itself that the necessary preliminary steps conferring the right upon the Resident to exercise that statutory power have been taken and to that end of examining the facts. Once the Court is satisfied that those preliminary steps have been lawfully taken, then the jurisdiction of the Court ceases.

It is contended for the appellant that he is not a person to whom the Banishment Enactment applies, because he is not "a person" within the meaning of section 3, because he is a subject of the State of Selangor. In my view the appellant has failed entirely in this case to establish the fact that the appellant is a subject of His Highness the Sultan of Selangor, and for that reason that argument fails entirely.

It is then said that, if not a subject of His Highness the Sultan of Selangor, the appellant is a subject of the Ruler of the State of Negri Sembilan, and because he is a subject of the Ruler of the State of Negri Sembilan, he becomes a subject of all the Rulers of all the four States of the Federation. It is then contended for the appellant that according to the comity of nations, or what is known as natural justice, no Ruler can banish from his State a natural born subject, and that therefore no ruler of any of the States of the Federation can banish from his State either one of his own subjects or the subjects of any of the other Rulers. That argument proceeds upon the hypothesis that the natural born subject of one Ruler is necessarily to be regarded as the natural born subject of every other Ruler of every other State of the Federation.

It is conceded by counsel for the appellant that prior to the Treaty of Federation, the Sultan of any State could banish from his State the subject of any other State of the Federation. Counsel for the appellant has entirely failed to satisfy me that the arrangement made by the Rulers of the States, which is commonly spoken of as the Federation, has in any way affected the relations subsisting on that date between each of the Rulers and his own subjects. On the other hand it seems to me that the Treaty of Federation is careful in its language to preserve the rights and powers of the Sultans as between themselves and their subjects. In my opinion, therefore, this argument fails entirely, because counsel for the appellant has failed to establish that by reason of the Federation the natural born subject of one State becomes the natural born subject of each of the other Rulers of the other States of the Federation.

The position then seems to me to be that His Highness the Sultan of Selangor at the time of these proceedings, had taken through the Resident proceedings under the Banishment Enactment to banish from his State a subject of the Ruler of the State of Negri Sembilan. It seems to me that it was entirely competent for the Ruler of Selangor to take that action.

The order of the learned Chief Justice refusing a rule absolute is right. I am of the opinion that this appeal must stand dismissed with costs to the Crown.

**GERAHTY, J.**—I concur.

**MUDIE, J.**—I am of the same opinion. I only wish to add with regard to the argument which was put forward that the natural born subject of one State becomes the subject of the Federation, it seems that it is impossible, because he would then become the subject of four Sultans, and that is repugnant to the conception of sovereignty. If that were possible, you would have the position that all the subjects of the four States would be the subjects of the four Sultans, and the four Sultans would then be the sovereigns of all the subjects of the four States. Of course, they are in fact sovereigns only of their own States. For that reason that contention cannot be maintained. I agree that the appeal should be dismissed.

Appeal dismissed with costs to the respondents.

*Appeal dismissed.*

Solicitor for the Appellant—*S. Veerasamy.*